United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 30, 2007

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Hertz Transporting, Inc. 530-6067-4001-3700
Case 32-CA-22506-1 530-6067-4001-4100
530-8054-9000

This case was resubmitted for advice as to whether the Employer violated the Act when it unilaterally reduced the number of jobs at one of its facilities. In agreement with the Region, we continue to adhere to our conclusions that the case is most appropriately analyzed as a Section 8(d) contract violation case, and that the charge should be dismissed, absent withdrawal, because the Employer had a sound arguable basis for believing that its actions were privileged by the parties' collective-bargaining agreement.

[*FOIA Exemptions 2 and 5*,[1]

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Thus, included in the record before us prior to our previous memorandum was evidence that, on January 25, 2006,[2]

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1 Hertz Transporting, Inc., Case 32-CA-22506-1, Advice Memorandum dated September 27, 2006.

2 All dates hereinafter are in 2006, unless otherwise noted.

the day he found out that the Employer would only be posting 30 positions at the airport, the Union's business agent asserted to the Employer's city manager that the Employer was violating the contract and past practice and stated that the Union was going to file a grievance. The evidence further disclosed that the reason the Union did not ask for bargaining about the bid was that the parties had just bargained about it during contract negotiations, and the Union thought this was a matter for a grievance. The evidence also disclosed a conversation that the business agent had the next day with the Employer's chief negotiator, but there was no mention of any request to bargain over the job posting, or any refusal by the Employer to bargain over it. Rather, all of the evidence indicated that the Union had no intent to bargain over this issue because it saw the Employer's conduct as a violation of the parties' existing collective-bargaining agreement, and thus more properly the subject of a grievance (which the Union immediately filed) than one for bargaining.

In October, after the Union was notified of the conclusions set forth in our previous memorandum, the Union again offered evidence indicating that, in the business agent's January 25 conversation with the Employer's city manager, the business agent said that the Union would be grieving the posting and that, while he asked the Employer not to post the bid until the dispute was settled, he did not ask the Employer to bargain. The Union now asserts, however, that the reason he did not ask him to bargain was because he did not believe the city manager had the authority to bargain or was in a position to make a decision. As to the conversation the next day with the Employer's chief negotiator, the Union for the first time made new assertions, including that the Union representatives participating in the conversation told the Employer's negotiator that the bid was not acceptable because it was not what the Union agreed to as part of the contract and that one of the Union representatives said that they needed to bargain about this. The Employer negotiator responded that it was a matter for a grievance and that he did not get involved in grievances -- they had to talk to local management about the grievance. The Union did not respond to the statement that it was a matter for a grievance. The Union filed its grievance immediately after their conversation (as the Union had stated it would the day before). Finally, the Union also concedes that a job

bid has to be posted for two weeks before the Employer actually implements it.[3]

In agreement with the Region, we conclude that this evidence does not provide a basis for altering our previously articulated view that this case is most appropriately analyzed as a Section 8(d) contract violation case, rather than as one involving a refusal to bargain or the presentation of a fait accompli. We therefore continue to adhere to our conclusion that the charge should be dismissed, absent withdrawal, because the Employer had a sound arguable basis for believing that its actions were privileged by the parties' collective-bargaining agreement. As we discussed in our previous memorandum, the Union's position throughout this dispute has been that the Employer was contractually bound to maintain a minimum of 81 full-time jobs at the airport, and that this agreement could not be changed without the Union's consent. Thus, on January 25, the Union claimed that the Employer was circumventing the contract and past practice and that, if the Employer went through with the 30-job location bid, the Union would file a grievance and the Employer would face labor unrest. The Union filed a grievance the next day claiming only a violation of the contract, which the Employer denied, and thereafter sought mediation pursuant to the contractual procedure. At that time, the Union explained that it did not demand bargaining because it believed that the matter had just been fully bargained and was a matter for a grievance, not bargaining.

The new offer of evidence from the Union does not change these essential facts. Thus, the Union reiterates that, in the January 25 conversation, it made no request to bargain and said that it would be grieving the posting. The evidence that, in the conversation the next day, a Union representative said that they needed to bargain about

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3 [*FOIA Exemptions 5, 6 7(C) and 7(D)*

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this is the first mention of a bargaining demand. Even if credited, we conclude that the context of the remark shows that it refers to the parties' discussing settlement of the purported contract violation, rather than any bona fide bargaining over an open subject of bargaining. In this regard, the Union representatives first said that the bid was not acceptable because it was not what they agreed to as part of the contract.[4] Moreover, not only did they fail to respond to the Employer's statement that it was a matter for a grievance, but they immediately filed a grievance after that conversation. The grievance alleges only a violation of the asserted 81-job minimum. And, when the Union filed the charge in the instant case a month later, it made no express claim of any failure or refusal to bargain or presentation of a fait accompli. In all these circumstances, we agree with the Region that the additional testimony presented by the Union fails to establish that the Union would have sought bargaining over the transfers but for the Employer's having presented it with a fait accompli.

Accordingly, for all these reasons, we agree with the Region that the charge in the instant case should be dismissed, absent withdrawal.

B.J.K.

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4 The Board will not equate a protest of an impending change with a request to bargain. See Ciba-Geigy Pharmaceuticals Div., 264 NLRB at 1017, citing Clarkwood Corporation, 233 NLRB 1172 (1977).